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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 144

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, *Petitioner*

v.

EZRA TAFT BENSON, Individually and as SECRETARY OF AGRICULTURE, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The Government seems to think that "basically inconsistent" decisions by the Circuits require review only of the case the Government loses—compare the Government's opposition to certiorari in this case with its petition in No. 1151, *Panama Canal Company,*

Petitioner, v. *Grace Line, Inc., et al.* In view of this approach, we submit this reply brief to show why review of this case is required because of the "inconsistent" decisions and the importance of the question presented.

The petition for certiorari stressed the importance of the question presented as to the scope of standing to sue under Section 10(a) of the Administrative Procedure Act, and stated that it was unlikely that any conflict would develop between the Circuits on the question (Pet. 6-11). The unlikely has now happened, and a conflict has developed. The Solicitor General with his customary and commendable candor first called attention to this in the brief in opposition (pp. 10-11) by discussing the then unreported opinion of the Court of Appeals for the Second Circuit in *Grace Line* v. *Panama Canal Company*, decided April 8, 1957 (which has just been reported in the advance sheets for July 1, 1957, 243 F. 2d 844), and by stating that a petition for a writ of certiorari would be filed in that case raising the standing issue. That petition was filed on July 6, 1957, *Panama Canal Company, Petitioner* v. *Grace Line, Inc., et al.*, No. 1151. It vigorously raises the issue of standing to sue and devotes over five pages to discussing why certiorari should be granted because of the conflict on the issue—see petition in No. 1151, pp. 22-28.

Certiorari should be granted in this case because of the importance of the standing to sue issue and the conflicting views which have been taken on it by the District of Columbia and the Second Circuits. In opposing certiorari respondents do not argue that the question is unimportant, or that there is no conflict.

Instead, the thrust of their argument is merely that the decision below is correct, that it *may* be possible to dispose of *Grace Line* without reaching the standing issue if certiorari is granted in that case, and that the factual situations are different (Br. in Opp. 10-11). These are unconvincing reasons for denying certiorari in a matter of this importance on which conflicting results have been reached by the District of Columbia and the Second Circuits.*

The opinion of the Second Circuit in *Grace Line* is now reported at 243 F. 2d 844 and is printed in the appendix to the petition in No. 1151. *Grace Line* is an action by users of the Panama Canal to compel a government corporation, the Panama Canal Company, to set tolls under the Act of September 26, 1950, 64 Stat. 1038, amending Sections 411 and 412, Title 2, of the Canal Zone Code, effective as of July 1, 1951 (referred to in the opinion and hereinafter as the Panama Canal Act of 1912 as amended in 1950). The

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* The petition in *Grace Line* states (Fn. 59, pp. 26-27) that, although the holdings are "basically inconsistent", the Government is opposing certiorari in the instant case because the decision "is so clearly correct and is in such accord with controlling precedents that it needs no review by this Court." This argument is no ground for denying certiorari, particularly since it is unsound. It glosses over the fact that the "controlling precedents" on standing cited in the *Grace Line* petition were decided before the enactment of the Administrative Procedure Act, except for the decisions of the Court of Appeals for the District of Columbia Circuit in *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, cert. denied, 350 U.S. 884, in *Benson* v. *Schofield*, 236 F. 2d 719, cert. denied, 352 U.S. 976, and in this case. *Benson* v. *Schofield* does not deal with the Administrative Procedure Act. We have pointed out in our petition (pp. 6-10) how the decision in this case (and in *Kansas City* on which it is based) incorrectly restricts Section 10(a) of the Administrative Procedure Act contrary to its express language and its legislative history.

complaint was dismissed for want of jurisdiction, but the Second Circuit, speaking through Chief Judge Clark, reversed and held that plaintiffs-appellants had standing to sue. After pointing out that there "is nothing in §§ 411 and 412 expressly authorizing or expressly precluding judicial review", the Court found statutory support for standing to sue in Section 10(a) of the Administrative Procedure Act, holding:

> "Nor is there any lack of standing to sue. Section 10(a) of the Administrative Procedure Act, 5 U. S. C. §1009(a), confers standing on persons 'suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute,' and the plaintiffs can point to the Panama Canal Act of 1912, as amended in 1950, as well as the Hay-Pauncefote Treaty, as their statutory authority."

See 243 F. 2d at 853 and 856.

Respondents concede that "the general approach of the Court of Appeals for the Second Circuit to the question of standing in the *Grace Line* case appears to be inconsistent with that taken in the instant case" (Br. in Opp. 10). Actually, the conflict between this case and *Grace Line* is much more substantial and direct. The Government admits as much, both by what is not denied about the conflict on standing in the brief in opposition here and by what is said about the conflict in the petition in *Grace Line*—see pp. 22-28 of that petition, and particularly the discussion at pp. 25-27 of Section 10(a) of the Administrative Procedure Act and of *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, certiorari denied, 350 U.S. 884. *Kansas City* was the sole authority on which the instant case was decided.

It is true that the factual situations are different. It is also true that the "relevant statutes" are not the same—the Panama Canal Act of 1912 as amended in 1950 is the "relevant statute" in *Grace Line* and the Rural Electrification Act as amended is the "relevant statute" in this case. Nevertheless, from the standpoint of being "relevant statutes" under Section 10(a) of the Administrative Procedure Act, the statutes are substantially similar. This is apparent from the statutes themselves—thus, neither statute expressly provides for judicial review; neither contains any reference to persons who may be "adversely affected or aggrieved"; and both fix standards by which governmental agencies are to conduct governmental functions, i.e., the making of loans for rural electrification under the Rural Electrification Act and the fixing of tolls for the use of the Panama Canal under the Panama Canal Act of 1912 as amended. The similarity of the statutes from the standpoint of "relevancy" is even more apparent from respondents' common characterization of both statutes as non-regulatory statutes which were not intended to confer any rights on private parties. Thus, respondents state that the Rural Electrification Act "does not in terms confer any rights upon the power companies . . . [and] does not regulate or impose restraints upon the manner in which Iowa-Illinois conducts its business" (Br. in Opp. 5-6) and similarly that the Panama Canal Act as amended is "a statute dealing with the non-regulatory management of public property and conferring no rights upon the users of this property" (Br. in Opp. 10). If the one statute is a "relevant statute" under Section 10(a) of the Administrative Procedure Act, so is the other.

Accordingly, there is a substantial conflict between the District of Columbia and the Second Circuits as to the availability of judicial review under the clause of Section 10(a) of the Administrative Procedure Act which grants judicial review to any person adversely affected or aggrieved by agency action "within the meaning of any relevant statute". This conflict is heightened by the rejection in *Grace Line* of the argument accepted below and renewed here (Br. in Opp. 6-7) that the petitioner's sole relief is review by superior executive and legislative authority. As stated in *Grace Line* (243 F. 2d 857), "For the person unable to get redress from the busy legislature or White House the courts remain open". And we submit that it is a matter of transcendent importance that they remain open.

The Government argues that the consequences of the broad concept of standing to sue adopted by the Second Circuit in *Grace Line* are "momentous" (petition in No. 1151, p. 27). We think, as urged in our petition (p. 6), that it would be equally momentous if the restricted concept adopted by the District of Columbia Circuit should be permitted to stand. The two cases present fundamentally opposed views as to the meaning of Section 10(a) of the Administrative Procedure Act. It is for this Court to make the ultimate decision whether under that Section the courts, in situations such as these, are open to private persons to challenge administrative action, as held in *Grace Line*, or are closed as held by the decision below. In these days of ever increasing administrative action few matters are of more basic concern to our system of government and our regard for individual rights. We repeat that, if the decision below stands, a substantial blow has

been dealt to the system of checks and balances devised by Congress in the Administrative Procedure Act to prevent unlawful administrative action.

For the reasons stated in the petition and in this reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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